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IN THE

# Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,
*Appellant,*

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET. AL.,
*Appellees.*

**On Appeal from the United States District Court for the District of Columbia**

## BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, ASIAN AMERICAN INSTITUTE, ASIAN LAW CAUCUS, ET AL. IN SUPPORT OF APPELLEES

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## STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

The Asian American Justice Center ("AAJC"), a 501(c)(3) nonprofit, nonpartisan organization, was incorporated in 1991 and opened its Washington, D.C., office in 1993. AAJC works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. In accomplishing its mission, AAJC works to promote civic engagement, to forge strong and safe communities, and to create an inclusive society in communities on a local, regional, and national level. A nationally recognized voice on behalf of Asian Americans, AAJC focuses its expertise on voting rights, anti-Asian violence prevention/race relations, census issues, immigrant rights, language access, and affirmative action. AAJC has maintained a strong interest in the voting rights of Asian Americans and strives to protect Asian Americans' access to the polls. Such long-standing interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

*Amici* include some of the largest and oldest Asian American groups in this country. These organizations are involved in challenging racial discrimination, safeguarding civil rights, and protecting the voting rights of Asian Americans. Statements of interest for additional *Amici* are included in Appendix A.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

Appellant asks the Court to declare Section 5 of the Voting Rights Act unconstitutional. As other briefs have shown, Section 5 and its reauthorization are a valid exercise of Congressional power under the Fourteenth and Fifteenth Amendments. The purpose of this brief is to highlight continuing disparities faced by Asian American populations in Section 5-covered jurisdictions with respect to voter registration and turnout, electoral representation, and racial discrimination in voting, thereby demonstrating that Section 5 is essential to ensuring access to the polls by Asian Americans, particularly as Asian American populations continue to rapidly grow in Section 5-covered jurisdictions.

## ARGUMENT

As the Court has recognized, this country's long history of racial discrimination in voting continues in the present day, and the effects of this discrimination still pervade our system of democracy. *See Bartlett v. Strickland*, __ U.S. __, No. 07-689, 2009 U.S. LEXIS 1842, *42 (Mar. 9, 2009) ("racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions. . . ."). In response to this history of discrimination against racial minorities, Congress passed the Voting Rights Act, together with other important civil rights legislation, in 1965. Section 5 of the Voting Rights Act serves an important tool in vindicating the voting rights of racial minorities. Section 5 has been extended four times by Congress, in 1970, 1975, 1982, and 2006. In approving the most recent extension of Section 5, Congress heard testimony from numerous

organizations and individuals on the important role that the Voting Rights Act has played in deterring civil rights violations and ensuring equal access to voting.

AAJC and other *Amici* supported the 2006 reauthorization of Section 5 and the other temporary provisions of the Voting Rights Act because it recognized the importance of the Voting Rights Act in ensuring equal access to voting for Asian Americans. Although Asian Americans are at times overlooked when examining our country's history of racial discrimination, the lingering effects of racial discrimination against Asian Americans remain today.[2] The Voting

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[2] Asian Americans are often portrayed as the "model minority," with the assumption that they have succeeded in achieving economic prosperity and assimilating into American society. This myth ignores the diversity within the Asian American community, as well as the long history of discrimination against Asian Americans that unfortunately continues today. *See, e.g.*, Frank H. Wu, *Yellow: Race in America Beyond Black and White*, 39-59 (Basic Books 2002) (discussing the empirical and other flaws in this myth); Deborah Woo, *Glass Ceilings and Asian Americans: The New Face of Workplace Barriers*, 34-38 (Altamira Press 2000). Contrary to the model minority myth, Asian Americans' socioeconomic status reflects the lingering effects of racial discrimination, as eleven Asian American groups have poverty rates above average, including Chinese, Koreans, Vietnamese, and Pakistanis. *See* Asian American Justice Center, *A Community of Contrasts: Asian Americans and Pacific Islanders in the United States* 2 (2006) [hereinafter *Community of Contrasts*]. Asian Americans experience "glass ceiling" barriers in the corporate sector, the federal government, science and engineering, academia, the federal judiciary and discrimination in government contracting. *See Continuing Need for Section 203's Provisions for Limited English Proficient Voters*: *Hearing on S. 2703 Before Subcomm. On the Constitution, Civil Rights and Prop. Rights of the Comm. on the Judiciary,* 109th Cong. 9-10 (June 13, 2006) (statement of Karen K. Narasaki, Pres. and

Rights Act helps to remedy continued discrimination and its provisions, including Section 5, are targeted toward the areas with the most need. As Asian American voters continue to encounter discrimination at the polls and as the Asian American population grows in jurisdictions covered by Section 5, Section 5 will become even more crucial to ensuring meaningful and fair representation for Asian Americans.

## I. ASIAN AMERICAN VOTERS IN SECTION 5 JURISDICTIONS CONTINUE TO ENCOUNTER DISCRIMINATION AND SUFFER FROM DISPARITIES IN VOTING PARTICIPATION AND ELECTORAL REPRESENTATION.

In *City of Rome v. United States*, the Court upheld the constitutionality of Section 5 of the Voting Rights Act and reaffirmed its decision in *South Carolina v. Katzenbach* that Congress may outlaw voting practices that are discriminatory in effect. 446 U.S. 156, 175 (1980) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966)). The Court recognized that Congress, in considering the extension of the Voting Rights Act in 1975, determined that, though voter registration among African Americans had improved since the initial passage of the Voting Rights Act in 1965, significant disparities existed between the percentages of registered whites and African Americans to vote, and recognized the dearth of African Ameri-

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Exec. Dir., Asian Am. Justice Ctr.) [hereinafter *Narasaki Statement*], *available at* http://www.advancingequality.org/files/VRA_Senate_Hearing_Statement_706.pdf. Asian Americans also face barriers to voting, in part because of high levels of limited English proficiency.

can elected officials, particularly in state office. *See id.* at 180-81.

### A. Asian American Populations In Section 5 Jurisdictions Suffer From Disparities In Voter Registration and Turnout.

Though it has been almost thirty years since the Court's decision in *City of Rome*, disparities in voting and political representation still exist. Asian Americans in particular continue to suffer from disparities in voter registration and turnout as compared to non-Hispanic white Americans. The U.S. Census Bureau reported that in November 2006, 49.1% of eligible Asian Americans were registered to vote, as opposed to 71.2% of eligible non-Hispanic white Americans nationwide. *See* U.S. Bureau of the Census, *Reported Voting and Registration of the Citizen Voting-Age Population, for States: November 2006*, Table 4b (Nov. 2006) [hereinafter 2006 Table 4b], *available at* http://www.census.gov/population/www/socdemo/votive/cps2006.html. Likewise, only 32.4% of eligible Asian Americans voted, as opposed to 51.6% of eligible non-Hispanic white Americans.[3] *See id*.

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[3] The Census Bureau reported that the percentage of Asian American citizens who were registered and voted decreased slightly between 1994 and 2002 as the Asian American citizen population became larger. *See* U.S. Bureau of the Census, *Voting and Registration in the Election of November 2002: Population Characteristics* 5 (July 2004), *available at* http://www.census.gov/prod/2004pubs/p20-552.pdf. The percentage of Asian American citizens registered were 51.9, 49.1, and 49.2 in 1994, 1998, and 2002, respectively. The percentage of Asian American citizens who voted were 39.4, 32.3, and 31.2 in 1994, 1998, and 2002, respectively. *Id.*

The voting rates for Asian Americans also tend to be lower in the South (a low of 24.7%), where many covered jurisdictions are located, including Georgia, Texas and Virginia. *See* U.S. Bureau of the Census, *Voting and Registration in the Election of November 2006: Population Characteristics* 8 (June 2008), *available at* http://www.census.gov/prod/2008pubs/p20-557.pdf. For example, in Georgia, which has a population of 102,000 Asian American citizens, only 30.4% of those citizens were registered to vote in November 2006; 25.7% actually voted. *See* 2006 Table 4b, *supra*. This is in stark contrast to the percentage of non-Hispanic white citizens in Georgia who were registered (68.8%) and who voted (46.9%). *See id.*[4] In the 2008 general election, only 58% of Georgia's Asian American registered voters turned out to vote compared to 77% of white registered voters. *See* Ga. Sec'y of State Voter Registration Sys., *Active Voters by Race/Gender, General Election Voting History* (Jan. 22, 2009), *available at* http://sos.georgia.gov/elections/voter_registration/2008%20stats/DocumentDirect%20SSVRZ376_Nov_2008.pdf.

### B. Asian Americans in Section 5 Jurisdictions Also Lack Electoral Representation.

In addition to these disparities in voter registration and turnout, Asian Americans continue to lack repre-

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[4] Similarly, in Texas, home to 319,000 Asian American citizens, only 43.0% were registered in November 2006 with 24.1% actually voting. *See* 2006 Table 4b, *supra.* By contrast, 72.8% of non-Hispanic white citizens in Texas were registered with 45.2% voting. *See id.* In Virginia, home to 140,000 Asian American citizens, only 48.4% were registered in November 2006 with 25.2% actually voting. *See id.* By contrast, 71.1% of non-Hispanic white citizens in Virginia were registered with 51.9% voting. *See id.*

sentation in elected offices nationwide. This is particularly true in jurisdictions covered by Section 5. In the nine states that are wholly covered by Section 5 (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia), only five Asian Americans held state office in 2007. *See National Asian Pacific American Political Almanac* 82 (Don T. Nakanishi and James S. Lai, eds. 2007-08). Only eight Asian Americans held city council or mayoral positions. *See id*. Twenty-five Asian Americans were elected to judgeships and seven others were elected to school board or other positions. *Id*. at 83. These numbers are minute considering that the Asian American population ranges from 3% to almost 6% in five of these states (Alaska, Arizona, Georgia, Texas, and Virginia). *See* U.S. Bureau of the Census, *Annual State Population Estimates with Sex, 5 Race Groups* (5 Race Alone or in Combination Groups) and Hispanic Origin: April 1, 2000 to July 1, 2007, (May 1, 2008) [hereinafter 2007 State Population Estimates], *available at* http://www.census.gov/popest/states/asrh/files/SC-EST2007-5RACE-ALL.csv.

These numbers are sparse compared to the growing Asian American populations in these jurisdictions. For example, 915,201 Asian Americans resided in Texas in 2007, a 40.35% increase since 2000. *See id*. Asian Americans consist of 3.83% of the population in Texas. *See id*. Currently, only one Asian American serves in the Texas state legislature, which includes 181 members. *See* Nakanishi, *supra*, at 82. Virginia presents a similar situation, with one Asian American member of Congress, no Asian American representatives in the 140-member Virginia legislature, no Asian American city council members, and only two Asian American school and college board members. This is the case even though Virginia's population is

5.49% Asian American, and Asian Americans make up over 6% of the population in ten counties and independent cities in Virginia and over 10% of the population in four counties and independent cities. *See id.* at 82-83; U.S. Bureau of the Census, *Annual Population Estimates, Estimated Components of Population Change, and Rates of the Components of Population Change for Counties*: *April 1, 2000 to July 1, 2007* (March 20, 2008) [hereinafter 2007 County Population Changes], *available at* http://www.census.gov/popest/counties/files/CO-EST2007-ALLDATA.csv; U.S. Bureau of the Census, *Annual County Resident Population Estimates by Age, Sex, Race, and Hispanic Origin: April 1, 2000 to July 1, 2007 (Virginia)* (August 7, 2008), *available at* http://www.census.gov/popest/counties/asrh/files/cc-est 2007-5race-51.csv. Similarly, in Georgia, there were no Asian American members of Congress and only one Asian American representative in the 236-member Georgia state legislature, one Asian American city council member, and one Asian American school and college board member. This is the case, even though Georgia's population is 3.19% Asian American, and Asian Americans make up 4% or more of the population in eight counties in Georgia. See Nakanishi, *supra*, at 82-83; 2007 County Population Changes, *supra*; U.S. Bureau of the Census, *Annual County Resident Population Estimates by Age, Sex, Race, and Hispanic Origin: April 1, 2000 to July 1, 2007 (Georgia)* (May 1, 2008), *available at* http://www.census.gov/popest/counties/asrh/files/cc-est 2007-5race-13.csv.

### C. Asian American Voters in Section 5 Jurisdictions Still Suffer From Discrimination.

Discrimination against Asian American voters continues to afflict Section 5-covered jurisdictions.[5] The importance of continuing Section 5 coverage was recently underscored by discriminatory voting changes made by the State of Georgia that affected the rights of thousands of minority voters. In March 2007, Georgia implemented a citizenship confirmation system to cross-check information provided on voter registration forms against lists maintained by the Georgia Department of Driver Services ("DDS") and the federal Social Security Administration to verify citizenship. *See* Jonathan Springston, *Federal Court Intervenes in Handel's Voter Purge*, The Atlanta Progressive News (Oct. 31, 2008), *available at* http://

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[5] Indeed problems have persisted as recently as the November 2008 elections. In November 2008, the Asian American Legal Defense and Education Fund received hundreds of complaints from Asian American voters on its telephone hotline, which included Section 5 covered jurisdictions New York (partially covered), Louisiana, Texas, and Virginia. *See Asian American Voter Turnout High on Election Day, but Many Face Problems at Polls*, USAsian Wire (Nov. 5, 2008), *available at* http://www.usasianwire.com/release.php?id-1919922208. Voters in these jurisdictions experienced difficulties because of poll workers' non-compliance with language assistance obligations, names of registered voters being dropped from voter lists, and improper electioneering by poll workers. See *id* In Annandale, Virginia, volunteer monitors reported that campaign operatives told Korean voters how to vote and who to vote for. In Falls Church, Virginia, a poll worker ignored Asian American voters while assisting white voters who stood behind them. *See* Glenn Magpantay, *Attorneys Monitor Polls on Election Day 2008*, National Asian Pacific American Bar Association Lawyer (Winter 2009), at 6.

www.atlantaprogressivenews.com/news/0395.html. The verification system contained several flaws, including reliance upon outdated information contained in the DDS database, which is not updated to reflect citizenship status for persons who become naturalized after receiving a driver's license.

The Mexican American Legal Defense and Educational Fund ("MALDEF") and several other voting rights groups brought a lawsuit against the State of Georgia on behalf of a naturalized citizen who was issued a letter informing him that he may not be eligible to vote. *See* Complaint, *Morales v. Handel*, No. 1:08cv3172 (N.D. Ga. Oct. 9, 2008). Among other things, the lawsuit alleged non-compliance with Section 5's preclearance requirement.[6] As a result of the lawsuit, a three-judge panel of the U.S. District Court for the Northern District of Georgia held that Georgia's failure to submit its new verification system for preclearance was a violation of Section 5. *See* Order, *Morales v. Handel*, No. 1:08cv3172 (N.D. Ga. Oct. 27, 2008).[7] The court also issued a temporary injunction

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[6] Though Georgia is a covered jurisdiction under Section 5, it failed to submit its new verification system to the Department of Justice for preclearance. *See* Letter from Christopher Coates, Chief, Voting Section, U.S. Dep't of Justice, to Thurbert E. Baker, Attorney Gen. of Ga. (Oct. 8, 2008), *available at* http://www.maldef.org/voting_rights/litigation/Please_Submit_letter_from_DOJ.pdf (requesting that changes to voter registration process be submitted to Department of Justice or U.S. District Court for the District of Columbia pursuant to Section 5).

[7] Unfortunately, the court also required voters and prospective voters who were flagged as non-citizens to vote with a challenge ballot in the November 2008 election and submit proof of citizenship within two days of the election. *See* Order, *Morales v. Handel*, No. 1:08cv3172 (N.D. Ga. Oct. 27, 2008). As a result, ballots of voters who submitted a challenge ballot but did not provide proof of citizenship following the election were

staying the verification system to give the U.S. Department of Justice sixty days to review the system under the Voting Rights Act. *See id*.[8]

The case is a prime example of the continuing need for the preclearance requirement in Section 5 jurisdictions. The Georgia verification system disproportionately hindered minorities from voting by relying on outdated DDS data that failed to reflect citizenship status for recently naturalized citizens — 83% of Georgia residents who became naturalized citizens in the two years prior to the system's implementation were African American, Latino, or Asian American. *See* Letter from the Lawyers' Committee for Civil Rights Under Law, MALDEF, the Voting Rights Project of the American Civil Liberties Union, and Brian Spears to Christopher Coates, Chief, Voting Section, U.S. Dep't of Justice (Nov. 25, 2008) [hereinafter *Joint Letter to Coates*] (on file with the authors), at 9, citing DHS 2007 Yearbook of Immigration Statistics, Supp. Table 1, *available at* http://www.dhs.gov/ximgtn/statustics/publications/YrBk07Na.shtm; DHS Yearbook of Immigration

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thrown out. *See* Mary Lou Pickel, *Nearly 5,000 challenge ballots cast; most accepted*, The Atlanta Journal-Constitution (Nov. 8, 2008), *available at* http://www.ajc.com/services/content/metro/stories/2008/11/08/challenge_ballots_georgia.html?cxtype=rss&cxsvc=7&cxcat=13.

[8] Following the Department of Justice's October 8, 2008 letter to the Georgia Attorney General, Georgia submitted a request for preclearance of the new system. The Department has requested that Georgia provide more information to help determine whether the proposed change is retrogressive. *See* Letter from Christopher Coates, Chief, Voting Section, U.S. Dep't of Justice, to Dennis R. Dunn, Ga. Deputy Attorney Gen. (Dec. 15, 2008), *available at* http://www.aclu.org/pdfs/votingrights/morales_dojrequest_20081215.pdf.

Statistics, Supp. Table 1, *available at* http://www.dhs.gov/ximgtn/statistics/publications/YrBk06Na.shtm.

Not surprisingly, during the year-and-a-half period when Georgia operated the system before the court stayed implementation of the system, the individuals who were "flagged" under the system as non-citizens were also disproportionately minorities, including Asian Americans. Of the 4,596 individuals who were flagged and also identified by race or ethnicity, 20% were Asian American, an incredibly high number considering that less than 4% of Georgia's population is Asian American and only 1% of Georgia's registered voters are Asian American. *See Joint Letter to Coates*, *supra*, at 9, *citing* U.S. Bureau of the Census, Voting and Registration in the Election of 2006, Table 4b, *available at* www.census.gov/population/wwwsocdemo /voting/cps2006.html.

There has been no evidence that Georgia's verification system resulted in the state identifying any registrants who were not U.S. citizens. *See id*. at 17. Instead, the system created unnecessary barriers to voting for Asian Americans and other minority voters,[9] and highlights the continuing need for Section 5, which is designed specifically to prevent discriminatory practices such as Georgia's verification system from harming minority voters.

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[9] One of these voters, Marvin Lim, who became a naturalized citizen in 2007, underwent many efforts to prove his citizenship to Gwinnett County election officials after being flagged, including repeated phone calls and multiple faxes of his naturalization papers. *See Joint Letter to Coates*, *supra*, at 13. While Mr. Lim was eventually able to vote (by absentee ballot, which he had to return by express mail), it was only after these unnecessary steps to prove his citizenship. *See id.*

## II. AS ASIAN AMERICAN POPULATIONS CONTINUE TO GROW IN SECTION 5 JURISDICTIONS, SECTION 5 COVERAGE REMAINS CRITICAL TO DETERRING DISCRIMINATION AGAINST ASIAN AMERICAN VOTERS.

### A. As Asian American Populations Continue To Grow Rapidly In Section 5 Jurisdictions, Levels Of Discrimination Against Racial Minorities Can Be Expected To Increase.

No longer do Asian Americans live in enclaves solely in New York, California, and Hawaii. Significant growth of Asian American populations has taken place in metropolitan areas located in Section 5-covered jurisdictions such as Atlanta, Georgia and Houston, Texas.[10] *See Community of Contrasts, supra*, at 2. New Hampshire, Georgia, Arizona, North Carolina, and Virginia, states that are covered in full or in part by Section 5, were among the top ten states with the fastest rates of growth in the Asian American population between 2000 and 2004. *See id.* at 6; *see also* Haya El Nasser, *In a twist, USA's Asians are heading to the Mountain West, USA Today* (Jul. 6, 2008), *available at* http://www.usatoday.com/news/nation/2008-07-06-Asians-West_N.htm (noting the growth of Asian American populations in Nevada, Arizona, Texas, and Washington, D.C.). Georgia and

[10] The Asian American population has grown between 2000 and 2007 by the following percentages in the following Section 5-covered states: 37.41% in Alabama; 24.41% in Alaska; 60.59% in Arizona; 51.43% in Georgia; 12.57% in Louisiana; 28.06% in Mississippi; 43.70% in South Carolina; 40.35% in Texas; and 38.12% in Virginia. *See* 2007 State Population Estimates, *supra.*

North Carolina more than doubled their Asian American populations between 1990 and 2000.

As Asian American populations continue to increase rapidly in jurisdictions covered by Section 5, levels of racial tension and discrimination against racial minorities can be expected to increase. When groups of minorities, particularly groups of immigrants, move into or outgrow the population in an area, reactions to the influx of outsiders can result in racial tension.[11] Prejudice against Asian Americans persists today, and concerns about discrimination against Asian Americans are legitimate.

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[11] *See* Gillian Gaynair, *Demographic shifts helped fuel anti-immigration policy in Va.*, The Capital (Feb. 26, 2009), *available at* http://www.hometownannapolis.com/news/gov/2009/02/26-10/Demographic-shifts-helped-fuel-anti-immigration-policy-in-Va.html (noting that longtime residents of Prince William County, Virginia, perceived that their quality of life was diminishing as Latinos and other minorities settled in their neighborhoods); James Angelos, *The Great Divide*, N.Y. Times (Feb. 22, 2009) (describing ethnic tensions in Bellerose, Queens, New York, where the South Asian population is growing), *available at* http://www.nytimes.com/2009/02/22/nyregion/thecity/22froz.html?_r=3&pagewanted=1; Ramona E. Romero and Cristóbal Joshua Alex, *Immigrants becoming targets of attacks*, The Philadelphia Inquirer (Jan. 25, 2009) (describing the rise in anti-Latino violence where the immigration debate is heated in New York, Pennsylvania, Texas, and Virginia); Sara Lin, *An ethnic shift is in store; Some Chino Hills residents protest, in vain, an Asian market in the upscale community*, L.A. Times (Apr. 12, 2007), at B1 (describing protest of Chino Hill residents to Asian market opening in their community where 39% of residents were Asian).

### B. The Perception of Asian Americans As "Outsiders" That Motivated Past Racial Discrimination Still Persists and Leads To Voting Discrimination Against Asian Americans.

Discrimination against Asian American populations that are rapidly growing in Section 5-covered jurisdictions is of particular concern given the perception of Asian Americans as "outsiders," "aliens," and "foreigners." *See, e.g.*, Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 108-16 (1999) (describing history of whites perceiving Asian Americans as foreign and therefore politically ostracizing them).[12] Based on this perception, at various points in history Asian Americans

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[12] In 2001, a comprehensive survey revealed that 71% of adult respondents held either decisively negative or partially negative attitudes toward Asian Americans. Committee of 100, *American Attitudes Toward Chinese Americans and Asians* 56 (2001), *available at* http://www.committee100.org/publications/survey/C100survey.pdf. Racial representations and stereotyping of Asian Americans, particularly in well-publicized instances where public figures or the mass media express such attitudes, reflect and reinforce an image of Asian Americans as "different," "foreign," and the "enemy," thus stigmatizing Asian Americans, heightening racial tension, and instigating discrimination. C. Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165, 181 (1995); S. Turnbull, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 Asian Pac. Am. L.J. 72, 74-75 (2001); Terry Yuh-lin Chen, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 Asian L.J. 69, 72, 74-75 (2000); Jerry Kang, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-32 (1993); T. Devos & M. Banaji, *American = White?*, 88 J. Personality & Soc. Psych. 447 (2005) (documenting empirical evidence of implicit beliefs that Asian Americans are not "American").

were legislatively excluded from entering the United States and from gaining citizenship. *See, e.g.*, Tydings-McDuffie Act of 1934, ch. 84, 48 Stat. 456 (1934) (amended 1946) (imposing annual quota of fifty Filipino immigrants); Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952); Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952) (establishing an "Asiatic barred zone"); Geary Act, ch. 60 § 1, 27 Stat. 25 (1892); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (repealed 1943) (prohibiting Chinese workers from entering the United States); Naturalization Act of 1790, ch.3, 1 Stat. 103 (limiting naturalization to "free white persons"). People of Asian descent were ineligible for citizenship because they were considered neither African American nor White. *See Ozawa v. United States*, 260 U.S. 178, 198 (1922). Exclusion from citizenship consequently excluded Asian American immigrants from the right to vote.

Asian Americans were also subject to other discriminatory laws. They were removed from their homes and confined to areas set aside for slaughterhouses and other businesses thought prejudicial to public health or comfort. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (describing San Francisco ordinance). They were denied the right to own land and related real property rights. *See, e.g., Webb v. O'Brien*, 263 U.S. 313 (1923) (upholding California Alien Land Law prohibiting land rights for "aliens ineligible for citizenship"); *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding similar Alien Land Law in Washington); *see also* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. Rev. 37 (1998) (describing history of Alien Land Laws, which, while facially race-neutral, were passed in response to Japanese immi-

grants competing for agricultural land). They faced a number of other discriminatory laws ranging from foreign miner taxes, directed at Chinese gold miners, to anti-Asian business regulations. *See* Sucheng Chan, *Asian Americans: An Interpretative History* 46-47 (1991).

Perhaps the most egregious and best documented example of discriminatory treatment of Asian Americans by society and the law was the internment, without due process, of over 120,000 Japanese Americans during World War II. The internment was executed by Executive Order 9066, signed by President Roosevelt and sanctioned by the Court. *See Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment). Although Germany and Italy, too, were enemies, the United States did not accord similar treatment to German Americans or Italian Americans.

This summary illustrates the historical context against which discrimination against Asian American voters occurs today. Indeed, the hallmark of historical discrimination against Asian Americans—discrimination motivated by the perception of Asian Americans as outsiders—continues in the present era, as seen in various instances of discrimination against Asian American voters across the country:

> In 2005, a citizen named Martin Ringhofer challenged the right to vote of more than one thousand people with "foreign sounding" names, targeting primarily Asian American and Latino voters. Mr. Ringhofer targeted voters with names that "have no basis in the English language" and "appear to be from outside the United States" while eliminating from his challenge voters with

names "that clearly sounded American-born, like John Smith, or Powell." *See Narasaki Statement, supra*, at 7; Jim Camden, Man Says Votes from Illegal Immigrants (March 31, 2005), *available at* http://www.spokesmanreview.com/local/story.asp?ID=61944.

In 2004, an election judge in Cook County, Illinois, when asked why a Chinese ballot booth was not clearly marked as such, the election judge replied, "They don't need them anyway. They just use a piece of paper and punch numbers. They don't read the names anyway, so it doesn't matter." *See* Nat'l Asian Pacific Legal Consortium, *Sound Barriers: Asian Americans and Language Access in Election* 2004 10 (2005), *available at* http://65.36.162.215/files/sound_barriers.pdf.

In Los Angeles Koreatown during the 2004 general elections, a precinct inspector gave certain Asian American voters time limits and sent at least one Asian American voter to the back of the line. *See Testimony of EunSook Lee, Executive Director of the National Korean American Service & Education Consortium (NAKASEC) before the Nat'l Comm'n on the Voting Rights Act* (Sept. 27, 2005), *available at* http://www.votingrightsact.org/hearings/pdfs/lee_eunsook.pdf.

### C. Section 5 Is Needed To Combat Discrimination Against Politically Emerging Asian American Populations.

Given the history of racial discrimination against Asian Americans, the continuing perception of Asian Americans as foreigners and outsiders, and the growth of Asian American populations in Section 5-covered jurisdictions, Section 5 remains relevant and

provides an important tool in combating voting discrimination against politically emerging Asian American populations.

One prominent example of voting discrimination against Asian Americans occurred in Bayou La Batre, Alabama in August 2004. Bayou La Batre is a fishing village of less than 3,000 residents. Asian Americans began settling in Bayou La Batre after the Vietnam War in the 1970s, and now make up about one-third of Bayou La Batre's population. *See generally*, Frye Gaillard, *After the Storms: Tradition and Change in Bayou La Batre*, 94 Journal of American History 856 (Dec. 2007), *available at* http:// www.journalofamericanhistory.org/projects/katrina/Gaillard.html. Though Asian Americans have been in Bayou La Batre for many years, until recent elections their political participation has been minimal. For example, in 1996, only 15 of 800 votes cast in local elections were by Asian Americans. Spencer Overton, *Stealing Democracy: the New Politics of Voter Suppression* 74 (2006).

Though Bayou La Batre's population is diverse, racial animus against Asian Americans came to the forefront when an Asian American candidate ran for city council for the first time in the city's history. In the 2004 primary elections, Phuong Tan Huynh ran for a city council position against a white incumbent, J.E. "Jackie" Ladnier. Ladnier and his supporters challenged about fifty Asian American voters at the polls, to their faces, complaining that the voters were not U.S. citizens or city residents, or that they had felony convictions. *See id*. at 75; DeWayne Wickham, *Why renew Voting Rights Act? Ala. Town provides answer*, USA Today (Feb 22, 2006), *available at* http://www.usatoday.com/news/opinion/editorials/2006-

02-22-forum-voting-act_x.htm. These challenges constituted "scare tactics," which intimidated many who had been confronted. *See Challenged Asian ballots in council race stir discrimination concern*, Associated Press State & Local Wire (Aug. 29, 2004).[13] As explained by Ladnier, his supporters "figured if [Asian American voters] couldn't speak good English, they possibly weren't American citizens." *See Overton*, *supra* at 75. The challenged voters had to complete a paper ballot and have the paper ballot vouched for by a registered voter.

The U.S. Department of Justice confirmed that the challenges were race-based, and prohibited the challenges in the city's 2004 general election. *See* Katherine Sayre, *Feds to monitor election in Bayou La Batre*, al.com Press-Register (Aug. 26, 2008), *available at* http://www.al.com/news/press-register/index.ssf?/base/news/1219742108217850.xml&coll=3; *Wickham*, *supra*. Huyhn eventually won the council position by 100 votes. *See Overton*, *supra* at 76. However, concern about racial animus against Asian American voters persisted through 2008. The U.S. Department of Justice monitored the treatment of voters in Bayou La Batre in August and October 2008 to ensure compliance with the Voting Rights Act. *See* Sayre, *supra*; U.S. Dep't of Justice, *Justice Department to Monitor Elections in Alabama* (Oct. 6, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/October/08-ag-900.html; U.S. Dep't of Justice, *Justice Department to Monitor Three Local Elections in Ala-*

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[13] Huynh's sister, Linh Huyhn Tran, stated of the challengers, "These people were just hoping that if they challenged our voters, they would just back out. They'd feel like they were in some kind of trouble or they'd be intimidated by all the paperwork in English." *See Challenged Asian ballots*, *supra*.

*bama and Florida* (Aug. 25, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/August/08-crt-747.html.

## CONCLUSION

The Voting Rights Act, including Section 5, must be viewed in the context of this country's long struggle to protect the civil rights of racial minorities against discrimination. Although there has been much progress, much of it the result of the Voting Rights Act itself, disparities in voter registration and actual voting among Asian Americans as compared to white Americans, a lack of Asian American electoral representation, and acute instances of discrimination against Asian American voters around the country and particularly in Section 5 jurisdictions indicate that much needs to be done to secure equal opportunity for racial minorities to participate in our system of democracy. *See Bartlett*, 2009 U.S. LEXIS 1842 at *42. Congress has recognized that Section 5 is a vital tool in the fight to vindicate the voting rights of racial minorities, and the Court should uphold Congress's 2006 reauthorization of Section 5 as a valid and necessary exercise of its enforcement powers under the Fourteenth and Fifteenth Amendments.

Respectfully submitted,

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March 25, 2009

# APPENDIX

List of *Amici Curiae*

**Asian American Business Roundtable (AABR)**

The Asian American Business Roundtable (AABR) was established in 1989 to help Asian and other minority-owned businesses access federal procurement, expand their market base with the Federal Government as well as the commercial sector by providing information that is accurate and timely to enable them to make informed decisions beneficial to their companies. AABR has a long-standing interest in voting rights and protecting the rights of Asian Americans to access the polls. This interest has resulted in AABR's participation in a number of amicus briefs before the courts.

**Asian American Institute (AAI)**

Asian American Institute (AAI) is a pan-Asian, non-partisan, not for profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, by utilizing coalition building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. AAI is committed to ensuring that Asian Americans are able to vote and are unencumbered by barriers such as racial discrimination, inaccessible poll sites, and non-compliance with language assistance obligations. Through poll watching and exit polling, AAI works to document the difficulties that place unwarranted burdens upon Asian American voters. AAI thus has

an important interest in Section 5's protection of Asian American voters.

**Asian Law Alliance (ALA)**

The Asian Law Alliance (ALA), founded in 1977, is a nonprofit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. ALA has advocated for the voting rights of limited English speaking citizens residing in Santa Clara County for the past 15 years.

**Asian Law Caucus (ALC)**

The Asian Law Caucus is the nation's oldest legal and civil rights organization serving the low-income Asian Pacific American communities. The mission of the Asian Law Caucus is to promote, advance and represent the legal and civil rights of the Asian and Pacific Islander communities. Recognizing that social, economic, political and racial inequalities continue to exist in the United States, the Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society with a specific focus directed toward addressing the needs of low-income Asian and Pacific Islander. Such pursuit includes an interest in voting rights and protecting the rights of Asian Americans to access the polls, which in turn has resulted in the Asian Law Caucus' participation in a number of amicus briefs before the courts.

**Asian Pacific American Labor Alliance, AFL-CIO (APALA)**

The Asian Pacific American Labor Alliance (APALA), AFL-CIO, is the first and only national

organization of Asian Pacific American union members. It organizes and works with Asian Pacific American workers, many of them immigrants, to build the labor movement and address exploitative conditions in the workplace. APALA has a long-standing interest in voting rights and protecting the rights of Asian Pacific Americans. This interest has resulted in APALA's participation in a number of amicus briefs before the courts.

**Asian Pacific American Legal Center of Southern California (APALC)**

Founded in 1983, the Asian Pacific American Legal Center of Southern California (APALC) is the nation's largest non-profit public interest law firm devoted to the Asian American and Pacific Islander community. APALC provides direct legal services to indigent members of our community and uses impact litigation, policy advocacy, community education and leadership development to obtain, safeguard and improve the civil rights of Asian Americans and Pacific Islanders. APALC's civil rights litigation has covered a broad range of issues such as race and national origin discrimination, access to higher education, immigration and naturalization, language rights and garment worker rights. APALC has a long history of working to protect the voting rights of historically disenfranchised communities and thus has a strong interest in the outcome of this case.

**Asian Pacific American Legal Resource Center (APALRC)**

The Asian Pacific American Legal Resource Center (APALRC) is the Capital Region's nonprofit advocate advancing the legal and civil rights of Asian Pacific Americans through direct services, education, and

advocacy. APALRC serves the individual legal needs of low-income and limited-English proficient Asian Pacific Americans and advocates for broad-based systemic change on legal and civil rights issues impacting Asian Pacific Americans. APALRC is committed to ensuring that Asian Pacific Americans are able to vote. APALRC has conducted poll monitoring and exit polling in Virginia during the 2004 election and in Virginia, Washington DC, and Maryland during the 2006 and 2008 elections. These jurisdictions continue to lack significant local or statewide Asian Pacific American elected representation despite the exponential growth of the Asian Pacific American communities. Through APALRC's poll watching and exit polling, APALRC has documented the ongoing barriers that prevent equal participation by Asian Pacific American voters. APALRC thus supports ensuring the right to vote of Asian Pacific Americans through Section 5 of the Voting Rights Act.

**Asian & Pacific Islander American Health Forum (APIAHF)**

The Asian & Pacific Islander American Health Forum (APIAHF) is a national advocacy organization dedicated to promoting policy, program, and research efforts to improve the health and well-being of Asian American, Native Hawaiian, and other Pacific Islander ("AA and NHPI") communities. Founded in 1986, APIAHF approaches activities with the philosophy of coalition-building and developing capacity within local AA and NHPI communities. We advocate on health issues of significance to AA and NHPI communities, conduct community-based technical assistance and training, provide health and U.S. Census data analysis and information dissemination, and

convene regional and national conferences on AA and NHPI health. Our health and well-being advocacy extends to an interest in increased participation in the electoral process within the AA and NHPI communities and results in our participation in this amicus brief.

**Asian & Pacific Islander American Vote (APIAVote)**

Asian and Pacific Islander American Vote (APIAVote) is a national nonpartisan, nonprofit organization that encourages and promotes civic participation of Asian Pacific Islander Americans in the electoral and public policy processes at the national, state and local levels. We envision a society in which all Asian Pacific Islander Americans fully participate in and have access to the democratic process. As such, APIAVote has a long-standing interest in voting rights and protecting the rights of Asian Americans and Pacific Islanders to access the polls. This interest has resulted in APIAVote's participation in a number of amicus briefs before the courts.

**Boat People SOS, Inc. (BPSOS)**

BPSOS is a national immigrant services organization serving primarily Vietnamese refugees and immigrants with 13 branch offices nationwide. BPSOS' domestic operation includes a large array of human and immigration services for Vietnamese refugees and immigrants. They were denied basic civil rights, including the right to choose the form of government and the ruling party. When moving to America, many of these Vietnamese settled in enclaves in states and counties with egregious voting records. It is imperative that this new voting population is allowed to exercise their rights as Americans and not

experience disenfranchisement due to discrimination. Additionally, BPSOS has a branch office in Bayou La Batre, Alabama where there was significant voter disenfranchisement of Vietnamese Americans in the past two elections. It is because of this interest that BPSOS participates in the brief.

**Chinese for Affirmative Action (CAA)**

Chinese for Affirmative Action (CAA) was founded in 1969 to protect the civil and political rights of Chinese Americans and advance multiracial democracy in the United States. Today, CAA is a progressive voice in and on behalf of the broader Asian and Pacific American community. Advocates for systemic change that protects immigrant rights, promotes language diversity, and ensures racial injustice. CAA has a long-standing interest in voting rights and protecting the rights of Chinese Americans to access the polls. This interest has resulted in CAA's participation in a number of amicus briefs before the courts.

**Fred T. Korematsu Center for Law and Equality (Korematsu Center)**

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is a nonprofit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to suc-

cessfully challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in promoting participation in the democratic process through protecting voting rights and access to the polls. We note that the Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

**Hmong National Development, Inc. (HND)**

Hmong National Development, Inc. (HND) is a national 501(c)(3) nonprofit organization dedicated to building capacity, developing leadership and empowering the Hmong American community. HND works with local and national organizations, public and private entities, and individuals to promote educational opportunities, increase community capacity, and develop resources for the well-being, growth, and full participation of Hmong in society. HND has a long-standing interest in ensuring and protecting the voting rights of all Hmong to access the polls. This interest has resulted in HND's participation in a number of amicus briefs before the courts.

**Japanese American Citizens League (JACL)**

The Japanese American Citizens League (JACL), founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan civil rights organization with 113 chapters throughout the continental United States, Hawaii', and Japan. The mission of the JACL is to uphold the civil and human rights of Americans of Japanese Ancestry and of all people. The JACL played a prominent role in obtaining redress for Japanese Americans who were in-

terned during World War II. The JACL has also worked to educate against and combat discrimination on the basis of race, national origin, age, ethnicity, gender, or disability, and to protect the right of all persons to equal participation in the political process. In the past, the JACL has helped lead the Asian Pacific American community in the expansion and reauthorization of provisions of the Voting Rights Act in 1992 and 2006. Further, the JACL has committed to and adopted Resolutions supporting the Voting Rights Act at the JACL National Convention in 2006. Understanding the meaning and acknowledging the importance of the disenfranchising effect when voting rights are limited or eliminated for certain racial minorities, Amici thus has an important and substantial interest in this case.

**National Asian Pacific American Bar Association (NAPABA)**

The National Asian Pacific American Bar Association (NAPABA) is the national association of Asian Pacific American attorneys, judges, law professors, and law students, providing a national network for its members and affiliates. NAPABA advocates for the legal needs and interests of the Asian Pacific American community and represents the interests of over 40,000 attorneys and 58 local Asian Pacific American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, non-profit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the areas of civil rights. In furtherance of its mission to promote justice, equity, and opportunity for Asian Pacific Americans,

NAPABA works to protect Asian Pacific Americans' right to vote and participate in the electoral process.

**National Korean American Service & Education Consortium (NAKASEC)**

The National Korean American Service & Education Consortium is a national non-profit organization based in Los Angeles, California with a Washington DC office. NAKASEC affiliates are the Korean American Resource & Cultural Center in Chicago and the Korean Resource Center in Los Angeles. Founded in 1994, NAKASEC is a multi-issue civil rights and human rights organization based in the Korean American community. NAKASEC's mission is to project a national progressive voice for Korean Americans and promote their full participation in the United States. To this end, NAKASEC promotes equitable and just changes to the political and legislative systems through a combination of education and policy advocacy with grassroots organizing and community mobilization.

**National Asian Pacific American Women's Forum (NAPAWF)**

The National Asian Pacific American Women's Forum (NAPAWF) is the only national, multi-issue Asian Pacific American ("APA") women's organization in the country and works to build a movement to advance social justice and human rights for APA women and girls. To this end, NAPAWF supports protecting the right of all individuals to engage in the democratic process by having access to the polls.

**Organization of Chinese Americans, Inc. (OCA)**

Founded in 1973 as Organization of Chinese Americans, Inc., OCA is a 501(c)(3) national non-

profit, nonpartisan organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States. With over 80 chapters and affiliates across the nation, OCA's aims are to advocate for social justice, to promote civic participation, to advance coalitions and community building, and to foster cultural heritage. OCA monitors issues and policies that affect the Asian Pacific American community. OCA and its chapters have conducted poll monitoring/exit polling during the 2002, 2004, 2006 and 2008 elections.

**Sikh American Legal Defense and Education Fund (SALDEF)**

The Sikh American Legal Defense and Education Fund (SALDEF) is the oldest Sikh American civil rights and advocacy organization in the United States. Founded as the Sikh Mediawatch and Resource Task Force (SMART) in 1996, SALDEF empowers Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF has over a decade of experience in working with other Sikh and minority organizations in providing public policy, advocacy, and community education on discrimination issues. SALDEF has a strong interest in voting rights and protecting the rights of Asian Americans to access the polls.

**Southeast Asia Resource Action Center (SEARAC)**

Southeast Asia Resource Action Center (SEARAC) was founded in 1979 to facilitate the relocation of Southeast Asian refugees into American society as well as the development of nonprofit organizations led by and for Southeast Asians. SEARAC's principal

mission is to advance the interests of Southeast Asian Americans by promoting community empowerment and leadership development, as well as advocating for and representing the diverse Southeast Asian American community on issues and concerns such as education, health care, safety, economic development, and civil rights. We also foster civic engagement among Southeast Asian Americans, and represent our communities at the national level in Washington, D.C. As such, we have a strong interest in ensuring the voting rights of Southeast Asian Americans and strive to protect their access to the polls.